

State Of Wisconsin DIVISION OF HEARINGS AND APPEALS

Case No.: 3-NE-00-0114LB

In the Matter of a Proposed Wetland Fill in the City of Two Rivers, Manitowoc County, Wisconsin

FINDINGS OF FACT, CONCLUSIONS OF LAW AND WATER QUALITY CERTIFICATION

The City of Two Rivers, 1717 East Park Street, Two Rivers, Wisconsin, 54241, filed an application with the Department of Natural Resources for water quality certification under Section 401, Federal Clean Water Act, and Chapter NR 299, Wis. Admin. Code. The proposed project is located in the City of Two Rivers, Manitowoc County, in Section 31, Township 20 North, Range 25 East. The proposed project consists of filling in wetlands in an area which is proposed for subdivision. The project would affect .59 acres of wetlands.

The Department of Natural Resources issued a Notice of Water Quality Certification which stated that unless written objection was made within 30 days of publication of the Notice, the Department would grant certification subject to specified conditions without a hearing. Numerous timely objections were received.

On August 3, 2000, the Department filed a Request for Hearing with the Division of Hearings and Appeals. The case was adjourned after the U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook Co. v. U.S. A.C.O.E.*, 531 U.S. 159 (2001). A new scheduling order was agreed to after the Wisconsin legislature passed 2001 Wisconsin Act 6 (May 7, 2001) which extended state jurisdiction over isolated, non-Federal wetlands.

Pursuant to due notice hearing was held on November 13 and 14, 2001, at Manitowoc, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Attorney Michael Cain P. O. Box 7921 Madison, WI 53707-7921 City of Two Rivers, by

Attorney John Brue Whyte, Hirschboeck, Dudek, S.C. P. O. Box 2225 Manitowoc, WI 54220

Carol Nystrom, by

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FINDINGS OF FACT

- 1. The City of Two Rivers (Two Rivers or the City), 1717 East Park Street, Two Rivers, Wisconsin, 54241 has filed an application with the Wisconsin Department of Natural Resources (the Department) for water quality certification under Section 401, Federal Clean Water Act, and Wis. Admin. Code. ch. NR 299 and NR 103.
- 2. The project is located in the City of Two Rivers, Manitowoc County, in Section 31, Township 20 North, Range 25 East.
- 3. The project area is part of a large parcel owned by the City of Two Rivers. The area is known locally as College Hill, and it was originally purchased to be available as a U.W.-Center campus. This parcel as a whole consists of 63 acres, but 7 acres on the southern edge have been dedicated as a conservancy contiguous to an existing city park. It has for many years been used by city residents as a green space, for hiking, bird watching, and dog walking. The City proposes a residential subdivision, consisting of 96 single-family residences. The subdivision would be called Sandy Bay Highlands.
- 4. The City of Two Rivers submitted a Revised Application for the proposed fill in February, 2000. (Ex. 4) The City set forth various options, and the preferred option is Alternative G. (See: Ex. 4) The project involves filling wetlands in an area which is proposed for a subdivision. The wetlands have been delineated as lettered areas as there are numerous small wetlands. Area F would be enlarged to create a detention area. However, .19 acres of wetland would be filled in connection with road construction. A portion of Areas A and B, totaling .22 acres, would be filled for a street. Areas D (.12 acre) and L (.06 acre) would be entirely filled for a street. The remaining wetlands will be undisturbed. The project involves filling .59 acres of wetland. All of the wetlands are natural, except wetland Area F, which is an abandoned sand or gravel pit with steep side slopes.

5. The overall project purpose is to implement a two-phased plan for development of up to 96 single-family residential lots. Phase one anticipates development of 21 lots ranging from ¼ acres to just under an acre in size. Phase one includes a 7-acre parcel zoned conservancy south of the Phase 1 lot plat. A permanent easement is platted to provide a public access from the subdivision to the conservancy area. A second 35-foot wide permanent easement along Sandy Bay Road also provides public access to the conservancy area and will allow the City of Two Rivers to maintain a natural appearance along this Wisconsin Department of Transportation designated Rustic Road. Within this area, the City of Two Rivers has planned for a walk/bike trail connecting this development to the rest of the City. This phase also includes installation of the required infrastructure including roads, underground utilities, sidewalks, sewer and water service and construction of a stormwater retention basis.

The second phase of this plan includes development of additional residential lots north of the Phase 1 development. Phase 2 includes 75 lots ranging in size from approximately 0.3 to 1.0 acres and a 4-acre planned unit development site. A 1.2-acre conservancy area is proposed in the central portion of the Phase 2 area to preserve a buffer area around two of the higher quality wetlands on the site. This phase also includes installation of the required infrastructure including roads, underground utilities, sidewalks, sewer, and water service. (Ex. 4)

- 6. The overall project purpose of creating a subdivision of new single-family homes is not water dependent within the meaning of Wis. Admin. Code NR 103. (Hanaway)
- 7. The City of Two Rivers has limited growth opportunities for new home construction. The City is bounded by Lake Michigan to the east, the East Twin and West Twin Rivers and Woodland Dunes Nature Center to the West, and Point Beach State Forest to the north. The City presented statistics which suggests that new home construction within the City of Two Rivers has been limited by these factors.

There has been a recent annexation in connection with the building of a new high school. Nystrom argues that this area provides an alternative means for the City to pursue residential development within the City limits. However, even with the annexed areas, which are dedicated to the high school, there is no question that the City Center has limited available areas suitable for residential development. Two Rivers City Manager Greg Buckley testified that the City has a strong need for reasonably priced lots available for new home construction. This would serve existing city residents, attract new residents, and add to the city's tax base. Further, forced annexation or condemnation is not a practicable alternative because of the costs and difficulties involved. (Buckley) The school district bore many costs associated with developing of the new high school. Nystrom offered a list of existing family homes available for sale in Two Rivers, but that is a different real estate market than that for new construction. (Id.)

Taking into consideration cost and logistics, there are no practicable alternatives to the reduced fill authorized under the water quality certification set forth below.

8. The former DNR Water Management Specialist, Tere Duperrault, rated the area as having a high value for wildlife habitat. (Ex. 48) The area provides habitat for songbirds, game birds, fox, other furbearers and small mammals, reptiles, and herptiles. (Ex. 49) DNR Wildlife Biologist Jeff Pritzl noted that all of the small wetlands have value to wildlife, especially as nesting and migration habitat for many species of birds and herptiles. (Ex. 43) Pritzl opined that, the species of life that will continue to use those wetlands after the surrounding uplands are developed will be common species to Manitowoc County that are well adapted to living in fragmented habitats. (Ex. 43)

The greater weight of the credible evidence, including all of the expert testimony, suggest that the proposed wetland fill will not result in detrimental impacts upon wildlife habitat.

9. The area provides substantial habitat to numerous wildlife species, including as many as two endangered species. Both Henslow's sparrow and Blanding's turtle have been observed on the parcel or nearby. Mr. Bouchard, an experienced bird-bander with considerable knowledge of birds, identified Henslow's sparrow on the property. There is no question that Henslow's sparrows have made regular use of the property.

In September of 1999, the City undertook an extensive study of the impacts of the proposed fill on Henslow's sparrow. (Ex. 8) The study concluded that the College Hill property was "not ideally suited for breeding Henslow's sparrow" and that it was becoming less likely to be used by Henslow's sparrow as the field and grassland areas give way to more shrubs and trees. (Id., p. 15) DNR Grasslands Community Ecologist David Sample, an expert in grassland bird habitats, concurred with the City's conclusions. Sample opined that the proposal would not result in significant adverse impacts to the habitat of Henslow's sparrow.

The record is less clear with respect to Blanding's turtles making use of the area. There is no question that a single Blanding's turtle was found on a roadway not far from wetland area F. A reasonable inference might be, as Mr. Reimer suggested, that the Blanding's turtle was coming from that ponded area. The DNR consulted with Department herpetology expert, Bob Hay. DNR Staff concluded that there was a slight chance that Blanding's turtle might occasionally pass through the area while foraging, but that the site would not provide sufficient habitat to support the species. (Ex. 36; Pohlman) Most of wetland area F will not be filled, but its habitat characteristics are likely to change as it is expanded in connection with placement of a detention basin. However, there was no testimony which suggested that this change would have any impact upon the survival of even a single individual turtle.

The proposal will have no impact on survival of either Henslow's sparrow or Blanding's turtle. (Pritzl, Pohlman, Sample) Any loss of Henslow's sparrow or Blandings turtle or habitat for the same will not have a long-term or short-term impact on survival of either species. (Pohlman) The incidental taking of Henslow's sparrow is authorized because the project: does not cause jeopardy to the survival of the species; does not impact critical habitat, and provides some public benefit. (Pohlman)

- Wetland areas A and B have been degraded by work undertaken in connection 10. with placement of a utility corridor through the area. (Hanaway) Hanaway testified that the City has vague plans to connect a proposed roadway in the area up with other, existing roads. However, there was insufficient testimony on this point to prove that it is necessary and that there are no alternatives to this fill. There are numerous other possible areas available as roadways which could be constructed to serve the same area which would not involve the filling of wetlands. This is not sufficient to overcome numerous reasons not to fill wetland areas A and B. These areas have been historically very wet. Mr. Reimer personally observed the utility project and saw a large amount of water come to the surface in the immediate area of A and B. Further, massive amounts of fill were required to abate this wet condition. (Reimer) These wetland areas are nearly contiguous and provide some habitat value as well as water storage. Mr. Pritzl testified that it would be preferable from the standpoint of preserving wildlife habitat not to fill areas A and B, which are located fairly close together. The great weight of the evidence indicates these areas should not be filled because there are practicable alternatives to filling them.
- 11. Secondary impacts to remaining wetland areas would be reduced by the establishment of no-build buffer areas around the wetlands. (Hanaway) The buffer areas shall be as described in the certification set forth below. The buffer areas proposed by the City's wetland scientist Mr. Jon Gumtow have been accepted with one change. Because wetland area H is one of the better quality scrub-shrub wet meadow areas, the certification now requires a 25-foot buffer rather than the 10-foot buffer proposed by the City. Buffer areas would be best maintained by inclusion of enforceable conservation easements. (Hanaway) Accordingly, this has been added as an enforceable condition of the certification.
- 12. The City has not yet finalized plans for stormwater management in the proposed new subdivision. Stormwater discharges are regulated by DNR under separate regulatory authority pursuant to Wis. Stat. § 283.33 and ch. NR 216. It is not usual to have final design specifications completed after the wetland water quality certification has been granted. (Hanaway) However, the City has submitted preliminary designs which have been reviewed by the Department of Natural Resources (Ex. 33) DNR Area Water Management Specialist Hanaway testified that there was sufficient area available for the two proposed forebay detention areas located between wetlands F and G. Stormwater will be filtered through plants before entering the existing wetland areas. The Division has added a condition requiring the submission of a planting plan, emphasizing native plants which are best suited to filter sediments and absorb pollutants, as a requirement of the water quality certification. Further, the certification now requires the conservancy area around wetlands F and G that was described in Ex. 4, diagram 5.
- 13. There is no significant dispute that the College Hill area has a rich archeological and historical tradition. The parties stipulated that the proposed fill must be undertaken in conformance with Wis. Stat. § 44.40; that the State Historical Society should be contacted in the event artifacts are encountered; and, that the City should enter into a Memorandum of Understanding with the Menominee Nation. Given this stipulation, concerns over the possible destruction of native artifacts in connection with the proposed development are met for purposes of the NR 103 and NR 299 process. However, the City is specifically put on notice that the

project must be undertaken in compliance with the stipulation and any other applicable laws and/or regulations.

DISCUSSION

The City has decided to develop a residential subdivision in an area which many residents have came to value as green space. This will result in significant changes to the College Hill area. However, the issue in this proceeding is whether or not the proposed project meets state water quality standards for wetlands pursuant to Wis. Admin. Code §§ NR 299 and NR 103. The City has worked with the DNR to limit the area to be filled, and impacts to areas which are not filled. The Division has further limited the area to be filled and established enforceable buffer areas protecting against secondary impacts. There may be a slight reduction in the number of lots as a result of these minor changes, but the record did not support a finding that 96 lots are absolutely necessary for the project to be economically viable. With the modifications described above, the project will meet these standards, and certification must accordingly be granted.

CONCLUSIONS OF LAW

- 1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification cases pursuant to Wis. Stat. § 227.43(1)(b) and Wis. Admin. Code § NR 299.05(6).
- 2. The Department and the Division have jurisdiction over non-federal, isolated wetlands pursuant to Wis. Stat. § 281.36.
- 3. The project proponent bears the burden of proof in water quality certification procedures. The hearing is a de novo hearing as to whether the water quality certification shall be granted, granted with conditions, denied or waived. Wis. Admin. Code 299.05(6). The project proponent has carried its burden, so long as the conditions set forth below are met. All conditions are reasonable and necessary to protect the wetlands of the state.
- 4. Placement of the fill to create an access road is not a wetland dependent activity within the meaning of Wis. Admin. Code §§ NR 103.07(2) and NR 103.08(4)(a)(1), because construction of the access road is not of a nature that requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose.
- 5. There are currently practicable alternatives available and capable of being implemented to the proposed fill area and access road, after taking into consideration cost, available technology and logistics in light of overall project purposes within the meaning of Wis. Admin. Code § NR 103.07(2). This includes not filling wetland areas A and B.
- 6. The proposed fill results in violation of the standards contained in Wis. Admin. Code § NR 103.08(3) in that practicable alternatives to the proposed project which will not adversely affect wetlands exist and the project results in significant adverse impact to the

functional values of the affected wetlands, significant adverse impacts to water quality and other significant adverse environmental consequences.

7. The authorized fill areas described below meet the standards of NR 103 and NR 299, so long as the conditions set forth below are met.

WATER QUALITY CERTICATION

WHEREFORE, water quality certification is granted, subject to the following conditions:

- 1. The applicant must notify the Wisconsin Department of Natural Resources of his intent to start the discharge at least five business days prior to the beginning of the discharge. Within five business days after the completion of the discharge, the applicant must notify the Department of Natural Resources of the completion of the discharge.
- 2. The applicant must allow the Wisconsin Department of Natural Resources reasonable entry and access to the discharge site to inspect the discharge for compliance with the certification and applicable law.
- 3. The applicant is responsible for obtaining any permit or approval required by municipal zoning ordinances or by the Corps of Engineers before starting the project.
- 4. Authorization hereby granted by the Department is not transferable.
- 5. The Department must review and approve the plans for the alteration of wetland F, the proposed detention pond. Prior to filling wetland areas, the City shall submit a planting plan, emphasizing native plants, acceptable to the DNR. The City shall maintain the area around wetlands F and G as a conservancy as described in Ex. 4, diagram 5.
- 6. Wetland areas A and B shall not be filled and shall be restored, to the extent possible, to their pre-construction condition.
- 7. The wetlands which are to remain undisturbed must be protected during the construction and after completion of the project. This means motor vehicles are not allowed through these areas.
- 8. Erosion control best practices shall be employed to prevent siltation.
- 9. There shall be no construction within a buffer area of 25 feet of wetland areas F, G, H, J, M, and Q, all other wetland areas shall maintain 10 foot buffer areas. All buffer areas shall be enforced by written conservation easements.

- 10. The incidental take of Henslow's sparrow, a state-threatened species, is authorized because any potential loss of Henslow's sparrow or habitat for the same will have no long-term impact on the species presence in the region or state.
- 11. Prior to filling wetland areas, the City should submit a run-off control plan which complies with the standards set forth in Wis. Admin. Code NR 216.
- 12. This project must be undertaken in conformance with Wis. Stat. § 44.40. The City should enter into a memorandum of understanding with the Menominee Nation. The City must contact the State Historical Society in the event artifacts are encountered.

Dated at Madison, Wisconsin on December 14, 2001.

STATE OF WISCONSIN DIVISION OF HEARINGS AND APPEALS 5005 University Avenue, Suite 201 Madison, Wisconsin 53705 Telephone: (608) 266-7709 FAX: (608) 264-9885

By:_____

Jeffrey D. Boldt Administrative Law Judge

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NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

- 1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
- 2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
- 3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.